

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES C. HOGAN,

Plaintiff

v.

BRIAN OLVERA,
JORDAN TAYLOR,

Defendants

Case No.: 3:23-cv-00515-MMD-CSD

Order

Re: ECF Nos. 1, 1-1

Plaintiff, who is an inmate in custody of the Elko County Jail, has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and pro se complaint (ECF No. 1-1).

I. IFP APPLICATION

A person may be granted permission to proceed IFP if the person “submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1).

The Local Rules of Practice for the District of Nevada provide: “Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.

“[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981) (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

1 An inmate submitting an application to proceed IFP must also “submit a certificate from
2 the institution certifying the amount of funds currently held in the applicant’s trust account at the
3 institution and the net deposits in the applicant’s account for the six months prior to the date of
4 submission of the application.” LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been
5 at the institution for less than six months, “the certificate must show the account’s activity for
6 this shortened period.” LSR 1-2.

7 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount
8 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an
9 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly
10 deposits or the average monthly balance for the six-month period immediately preceding the
11 filing of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid,
12 the prisoner is required to make monthly payments equal to 20 percent of the preceding month’s
13 income credited to the prisoner’s account. 28 U.S.C. § 1915(b)(2). The agency that has custody
14 of the prisoner will forward payments from the prisoner’s account to the court clerk each time
15 the account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

16 Plaintiff’s certified account statement indicates that his average monthly balance for the
17 last six months was \$0, and his average monthly deposits were \$0.

18 Plaintiff’s application to proceed IFP is granted. Plaintiff is not required to pay an initial
19 partial filing. However, whenever his inmate account exceeds \$10, he must make monthly
20 payments in the amount of 20 percent of the preceding month’s income credited to his account
21 until the \$350 filing fee is paid.

II. SCREENING

A. Standard

Under the statute governing IFP proceedings, “the court shall dismiss the case at any time if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

In addition, under 28 U.S.C. § 1915A, “[t]he court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.” 28 U.S.C. § 1915A(a). In conducting this review, the court “shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint-- (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b)(1)-(2).

Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a complaint under these statutes, the court applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

The court must accept as true the allegations, construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*,

1 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are “held to less
2 stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9
3 (1980) (internal quotation marks and citation omitted).

4 A complaint must contain more than a “formulaic recitation of the elements of a cause of
5 action,” it must contain factual allegations sufficient to “raise a right to relief above the
6 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading
7 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
8 a legally cognizable right of action.” *Id.* (citation and quotation marks omitted). At a minimum, a
9 plaintiff should include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at
10 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

11 A dismissal should not be without leave to amend unless it is clear from the face of the
12 complaint that the action is frivolous and could not be amended to state a federal claim, or the
13 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
14 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

15 **B. Plaintiff’s Complaint**

16 Plaintiff sues Brian Olvera and Jordan Taylor, who are both officers within the Elko
17 Police Department. He alleges that he was pulled over by Officer Taylor for a traffic stop, and as
18 he was putting his wind down, Taylor started pulling Plaintiff out of the vehicle, and then he was
19 tased while on the ground and both Taylor and Olvera began to beat Plaintiff severely. Plaintiff
20 is 61 years old and was not capable of resisting.

21 While Plaintiff’s complaint mentions both the Fourth and Eighth Amendments, a claim
22 for excessive force during an arrest is governed by the Fourth Amendment. *See Graham v.*
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1 *Connor*, 490 U.S. 386, 395 (1989) (claim of excessive force during arrest is evaluated under the
2 Fourth Amendment's objective reasonableness standard).

3 Plaintiff may proceed with his Fourth Amendment excessive force claim against Olvera
4 and Taylor.

5 **III. CONCLUSION**

6 (1) Plaintiff's IFP application (ECF No. 1) is **GRANTED**. Plaintiff need not pay an
7 initial partial filing fee; however, whenever his inmate account exceeds \$10, he is required to
8 make monthly payments in the amount of 20 percent of the preceding month's income credited
9 to his account until the full \$350 filing fee is paid. This is required even if the action is
10 dismissed, or is otherwise unsuccessful. The Clerk must **SEND** a copy of this Order to the
11 attention of **Chief of Inmate Services for the Elko County Jail, 775 W. Silv St., Elko, NV**
12 **89801**

13 (2) The Clerk will **FILE** the complaint (ECF No. 1-1).

14 (3) The Complaint will **PROCEED** with the Fourth Amendment excessive force claim
15 against Olvera and Taylor.

16 (4) The Clerk of Court shall **ISSUE** summonses for Defendants Olvera and Taylor, **and**
17 **deliver the same**, to the U.S. Marshal for service. The Clerk also shall also **SEND** sufficient
18 copies of the complaint (ECF No. 1-1) and this Order to the U.S. Marshal for service on the
19 defendant(s). The Clerk shall **SEND** to Plaintiff **2** USM-285 forms. Plaintiff will have **21 days**
20 within which to furnish to the U.S. Marshal the required USM-285 forms with relevant
21 information as to each defendant on each form at 400 S. Virginia Street, 2nd floor, Reno, Nevada
22 89501. Within **20 days** after receiving from the U.S. Marshal a copy of the USM-285 forms
23 showing whether service has been accomplished, if any of the defendants were not served, and if

1 Plaintiff wants service to be attempted again, he must file a motion with the court providing a
2 more detailed name and/or address for service, or indicating that some other method of service
3 should be attempted.

4 (5) Plaintiff is reminded that under Federal Rule of Civil Procedure 4(m), service must
5 be completed within **90 days** of the date of this Order. If Plaintiff requires additional time to
6 meet any of the deadlines set by the court, he must file a motion for extension of time under
7 Local Rule 1A 6-1 *before* the expiration of the deadline, and the motion must be supported by a
8 showing of good cause. A motion filed after a deadline set by the court or applicable rules will
9 be denied absent a showing of excusable neglect.

10 (6) Plaintiff shall serve upon defendants or, if an appearance has been entered by counsel,
11 upon the attorneys, a copy of every pleading, motion or other document submitted for
12 consideration by the court. If Plaintiff electronically files a document with the court's electronic
13 filing system, no certificate of service is required. Fed. R. Civ. P. 5(d)(1)(B); LR IC 4-1(b); LR
14 5-1. If Plaintiff mails the document to the court, Plaintiff shall include with the original
15 document submitted for filing a certificate stating the date that a true and correct copy of the
16 document was mailed to the defendants or counsel for the defendants. If counsel has entered a
17 notice of appearance, Plaintiff shall direct service to the individual attorney named in the notice
18 of appearance, at the physical or electronic address stated therein.

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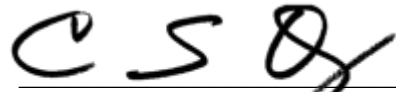
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1 The court may disregard any document received by a district judge or magistrate judge which
2 has not been filed with the Clerk, and any document received by a district judge, magistrate
3 judge, or the Clerk which fails to include a certificate showing proper service when required.

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5 **IT IS SO ORDERED.**

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7 Dated: January 11, 2024

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9 Craig S. Denney
10 United States Magistrate Judge
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